STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF HOLLAND,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.

/

Supreme Court No. 151053

Court of Appeals No. 315541

Ottawa County Circuit Court
No. 12-002758-CZ

Hon. Edward R. Post

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CONSUMERS ENERGY COMPANY'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

As Consumers explained in its application for leave, the result in this case is compelled by the Court's reasoning in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011). When a regulated utility is "the first utility to provide electric service to buildings and facilities" on a parcel, the regulated utility has "the right to serve the entire electric load on the premises." 489 Mich at 41. That right is "unaffected by subsequent changes in the customer." *Id.* The right is also unaffected by "destruction of the buildings and facilities" to which the regulated utility first provided electricity. *Id.* And a property owner "may not circumvent the limitations of rule 411(11) by attempting to receive service from a municipal corporation [like the City of Holland] not subject to PSC regulation." *Id.* at 42. This Court should grant leave and clarify that the result is exactly the same when it is the municipal corporation trying to circumvent the limitations of Rule 411(11) rather than the customer. Any other result renders a regulated utility's right of first entitlement a nullity.

The City of Holland implicitly agrees that the Court's opinion in *Great Wolf Lodge* means the City must lose. (Holland Resp Br 20 ("Had the courts below applied literally this Court reference in *Great Wolf Lodge* to landowners being bound by Rule 411(11), the outcome of this case might have been different.").) And the City expressly agrees that this Court's review is warranted. (E.g., *id.* at 2 (*Great Wolf Lodge* "has created considerable discord in the utility sector" and is "contrary to at least seven statutes"); *id.* at 3 ("This Court should take the opportunity to 'right the apple cart' – either by peremptory order or after plenary review"); *id.* at 7-8 ("the Court should use this opportunity [sic] clarify the erroneous references in the *Great Wolf Lodge* case"); *id.* at 10 ("The implications of this Court's references in *Great Wolf Lodge* are most serious."); *id.* at 11 (until this Court clarifies *Great Wolf Lodge*, "additional unnecessary litigation will follow.").)

The parties' mutual request that the Court grant leave to appeal is echoed by *amici*. (E.g., ABATE *Amici* Br 4 ("The negative impacts of *Great Wolf Lodge* are not theoretical; they are affecting peoples' lives.").) Indeed, as *amicus* ABATE notes, this case is "extremely important" to electric utility customers, municipalities, and the State at large. (*Id.* at 5.)

Accordingly, Consumers Energy asks that the Court (1) grant leave to appeal; (2) confirm that when a municipal utility seeks to poach a regulated utility's customer, the logic and holding of *Great Wolf Lodge* applies whether it is the customer or the municipal utility that seeks to nullify the regulated utility's right of first entitlement; and (3) clarify that a utility's right of first entitlement under MCL 124.3 cannot be circumvented by a brief break in service.

REPLY ARGUMENT

I. Holland and Consumers Energy agree that this Court should clarify the scope of *Great Wolf Lodge*.

Throughout its brief, Holland castigates this Court's opinion in *Great Wolf Lodge* as "erroneous," "unfortunate," or "mistake[n]." (Holland Resp Br at ii, iii, 8, 10, 11, 27.) Holland must do so, because taking *Great Wolf Lodge* to mean what it says requires summary reversal of the Court of Appeals' decision. (E.g., *id.* at 10, 20.) Accordingly, Holland asks this Court to clarify the scope of *Great Wolf Lodge*.

Holland has it half right. Holland is correct that *Great Wolf Lodge*'s language and holding clearly apply to this case, regardless of whether a customer *or* a municipal utility files suit to oust a first-serving regulated utility. But Holland is wrong to chastise the Court for its *Great Wolf Lodge* opinion. That *Great Wolf Lodge* holding and language were the logical application of Rule 411(11)'s meaning and purpose. In sum, while the parties have differing views on the ultimate result, both wholeheartedly agree that an important issue of statewide jurisprudential significance is at stake here. Leave is warranted.

II. Rule 411 protects all Michigan electricity consumers by ensuring the electric grid is not duplicated needlessly.

As the Court explained in *Great Wolf Lodge*, Rule 411's purpose is "to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service." 489 Mich at 38 (quotation omitted). To effect this goal, Rule 411 vests a right of "first entitlement" in the regulated utility that first serves a customer. But this right is not a sop to regulated utilities; it is a way of protecting *all* electricity consumers for the investments they make in utility companies in constructing the electric infrastructure that powers this State. It also protects utility customers from having to pay for needlessly duplicative infrastructure.

Holland tries to sidestep that important policy principle by arguing that it offered to provide electric service to the subject property "with no up-front installation charge." (Holland Resp Br 4.) What Holland doesn't say is that there was still a substantial cost for the City to extend its facilities: $65,050. (Koster Aff ¶ 17.) And while Holland chose to spare imposing that cost on its new customer to better compete with Consumers Energy's $35,000 installation charge, nothing in life is free. That $65,050 will be paid by other Michigan citizens, in the form of higher taxes, higher utility rates, or both.

That's the whole point of Rule 411 and its statutory companions, MCL 124.3(2) and MCL 460.10y(2): to protect Michigan citizens from having to spend precious dollars subsidizing duplicative utility expansion. Yet even while admitting this important purpose (Holland Resp Br 19), Holland pretends it has no applicability here and accuses Consumers Energy of trying to protect a monopoly.[1] Rule 411(11) and MCL 124.3(2) are not about protecting the market share of regulated utilities; they are about protecting all consumers.

[1] Holland also says that Rule 411 and MCL 124.3(2) cannot "completely prevent" duplication. (Holland Resp Br at 19.) No one is suggesting that they can. But there is a big difference between aiming to prevent duplication and reading Rule 411 in a way that is effectively powerless to prevent *any* duplication.

Even if Holland had figured out how to extend its facilities for free, the larger point still stands. Rule 411 and its statutory counterparts apply in all circumstances and foreclose the need to analyze whether construction of duplicative power grids makes sense depending on the facts of each case. Rule 411 and this Court's holding in *Great Wolf Lodge* compel the exact opposite result the Court of Appeals reached, and the Court of Appeals' failure to simply apply *Great Wolf Lodge* to the facts of this case was plain error. See, e.g., Dec 6, 2012 Pub Serv Comm'n Order at 4, attached as Ex D to Consumers Energy's Appl for Leave to Appeal (the MPSC expressed full confidence that the courts would decide the issue presented in light of "controlling law [that] has been set forth by the Michigan Supreme Court" in *Great Wolf Lodge*). The Court should grant leave and reverse.

III. If Holland's position is correct, then *Great Wolf Lodge* was incorrectly decided.

A major theme of Holland's brief is that Rule 411 "regulates only competitive disputes between *MPSC-regulated* utilities." (Holland Resp Br at 1 (emphasis in original); see also *id.* at 13 ("Rule 411 applies when both or all of the utilities are subject to the MPSC's jurisdiction.").) Indeed, Holland claims that this "lawsuit would not have been filed but for the clear implication in a single paragraph in the *Great Wolf Lodge* case that Rule 411 effectively is applicable to municipal electric utilities." (*Id*. at 27.)

But, if Holland is correct, then *Great Wolf Lodge* was incorrectly decided. That case was not a dispute between MPSC-regulated utilities, but rather a dispute between a customer and a regulated utility where the *customer* wanted to switch to a municipal utility. In other words, it was the electric *customer* who filed suit seeking to switch service to a municipal utility, and Rule 411 purported to regulate electric customers no more than it regulates municipal utilities. If Holland is right that Rule 411 has no applicability here, then Rule 411 likewise has no applicability to a non-utility/customer like Great Wolf Lodge. (Holland Br 16.)

Holland is wrong. This Court could not have been more clear when it said in *Great Wolf Lodge* that the regulated utility, Cherryland, was "entitled to the benefit of the first entitlement in Rule 411(11)," 489 Mich at 41, even though the competitive utility was municipal and thus not subject to MPSC regulation: "[I]t is *irrelevant* that [Traverse City Light & Power] is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. . . . Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation." *Id*. at 41-42 (emphasis added). A contrary result would make a "utility's right of first entitlement . . . subject to unilateral abrogation by property owners." *Id*. at 40, n 22. Rule 411(11)'s whole intent and purpose is to grant the "utility first serving buildings or facilities on an undivided piece of real property the *right* to serve the entire electric load on that property." *Id.* at 39 (emphasis added). That right is not contingent on the party bringing suit against the regulated utility.

Holland's position and the Court of Appeals' opinion eviscerate any possibility of a regulated utility enforcing its right of first entitlement. Despite the fact that Consumers Energy has provided electric service to the subject parcel since 1939—obtaining the right of first entitlement—Holland suggests that the right of first entitlement can be easily circumvented by any customer and municipal utility working together because the Public Service Commission has no jurisdiction over them. Consumers Energy does not dispute that the Public Service Commission has no jurisdiction over the City of Holland. (E.g., Appl for Leave 13.) But that fact is irrelevant to Consumers Energy's right to exclude other electric providers by virtue of the fact that it is a first-servicer. Holland's reading would generate the very situation Rule 411 is intended to prevent: an environment of duplicative electric facilities, all funded at the expense of Michigan rate payers.

IV. Holland advances no compelling argument against simply applying Rule 411 and the Court's opinion in *Great Wolf Lodge*.

Holland's additional arguments regarding Rule 411 and *Great Wolf Lodge* do not withstand scrutiny.

First, Holland suggests that the Court must have misunderstood Michigan electric utility law at the time the Court decided *Great Wolf Lodge* because neither Consumers "nor any municipal utility was a party to the case," and the "issue of Rule 411(11)'s application to municipal utilities was not a significant issue" and "not fully developed." (Holland Resp Br 9.) But the Michigan Municipal Electric Association was an *amicus* party in the case, represented by the same firm—actually the same two lawyers—that now represents Holland. And that *amicus* brief spent a whole argument section (II.B.2) making the exact same argument Holland makes here: "Rule 411 Is Not Applicable To a Municipal Utility." So the Court was hardly lacking the views of municipal utilities on this issue when it reached its decision in *Great Wolf Lodge*.

Second, Holland says that a municipal utility could "never, ever" be the first utility to serve a customer "under any circumstances." (Holland Resp Br 10.) Not true. If a parcel has always been vacant, with no buildings or facilities (i.e., customer) to serve, there is no first-serving utility and a municipal utility could fill that gap.

Third, Holland argues that Consumers' position is "contrary to the constitutional authority of Holland as well as Park Township." (Holland Resp Br 17.) In making this argument, Holland starts from the wrong premise. It assumes that Const 1963, art 7, §§ 24-25, and MCL 124.3 and 117.4f(c) are the *only* legal limitations on a municipality's authority to supply electric power. (Holland Resp Br 17.) But if Holland attempted to supply electricity in a way that violated a neighboring local government's zoning laws, or the State's environmental laws, surely those laws would circumscribe Holland's authority. (In a different section of its brief, Holland admits that reality. See Holland Resp Br 1 ("Under Michigan law, a municipal utility is permit-

ted to provide electric service anywhere in areas adjacent to the city *except as prohibited by law*.") (emphasis added).) A regulated utility's right of first entitlement is a similar such limit.

Holland also mistakenly assumes that a regulated utility's right of first entitlement forecloses a local government's constitutional authority to decide, through franchise permitting, which utilities may operate within the community's borders. (Holland Resp Br 17-18.) Consumers Energy has never made such a claim to a "permanent franchise" (*id.* at 18). And Holland's strawman argument is divorced from reality. No township is going to lightly terminate the franchise of a regulated utility that serves the vast majority of its residents so that a municipal utility can divest a regulated utility of its right of first entitlement.

Next, Holland says that neither Rule 411 nor MCL 124.3(2) "can completely prevent" the duplication of electric facilities. (Holland Resp Br 19.) But under Holland's theory, Rule 411 and MCL 124.3(2) can *never* prevent such duplication. Any electric customer and municipal utility can claim immunity from MPSC jurisdiction and deprive a regulated utility of its right of first entitlement.

Finally, Holland relies on purported factual differences between this case and *Great Wolf Lodge* to say that *Great Wolf Lodge* can be distinguished. (Holland Resp Br 20-27.) But as Consumers Energy already explained in its Application for Leave (pp 11-12), any asserted factual differences do not dictate a different *legal* result unless one starts with the premise (as does Holland) that *Great Wolf Lodge* was simply decided incorrectly.

V. Holland's construction of MCL 124.3(2) is also erroneous.

Finally, Holland advances a nonsensical reading of MCL 124.3(2). First, Holland essentially argues that MCL 124.3(2)'s use of the term "customer," defined in MCL 460.10y(2) as "the buildings and facilities served," is redundant. Under Holland's reading, "buildings and facilities" means the buildings *and buildings* served by a utility. Holland states that " 'facilities' means things that are designed, built, created or established by people." (Holland Resp Br at 24.) As this Court has stated, "[i]t is axiomatic that 'every word [in the statute] should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory.' " *Duffy v Michigan Dep't of Natural Res*, 490 Mich 198, 215; 805 NW2d 399 (2011) (quoting *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011)). If facility simply means those things that are designed, built, created, or established by people, it is indistinguishable from the term building and thus is rendered nugatory.

Second, rather than denying that its position means that even a five-minute (or five-second) break in service would be enough to allow a utility switching under MCL 124.3(2), Holland doubles down on that proposition. According to Holland, MCL 124.3(2) applies only when a "customer [is] *currently* [ ] receiving service." (Holland Resp Br at 25-26.) So the only way a change in service is precluded is if, at the very moment that the new service is switched on, the previous utility is still providing service.[2] Once a customer turns off the master switch and terminates the first-serving regulated utility's power supply, the customer is free to violate the first-service rule. Such an interpretation violates the statutory plain text and the context in which that language operates. This Court should reject Holland's invitation to essentially strike MCL 124.3(2) from Michigan's compiled law, a result that municipal utilities may only accomplish through the legislative process.

[2] It is not clear that such a scenario is even physically possible.

CONCLUSION AND REQUESTED RELIEF

As Holland agrees and the *amici* echo, this Court's intervention is necessary to clarify the scope of *Great Wolf Lodge*, Rule 411, and MCL 124.3(2) and 460.10y(2). (ABATE *Amicus* Br; Michigan Electric & Gas Ass'n, Michigan Electric Cooperative Ass'n, and DTE Electric Co, Mich Ct App *Amici* Br.) Regardless of how the Court perceives the merits of the case, leave is warranted. And because the only sensible reading of these authorities is to honor regulated utilities' right of first entitlement, the Court should reject Holland's contrary argument, reverse the Court of Appeals, and direct that judgment be entered in favor of Consumers Energy.

Respectfully submitted,

Dated: June 10, 2015

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